In the Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-586.

LOUIS OSTRER,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner's Response to Brief of the United States in Opposition.

ALAN DERSHOWITZ,
20 Elmwood Avenue,
Cambridge, Massachusetts 02138.
Counsel for Petitioner.

Of Counsel:
HARVEY A. SILVERGLATE,
ANN LAMBERT GREENBLATT,
SILVERGLATE, SHAPIRO & GERTNER,
217 Lewis Wharf,
Boston, Massachusetts 02110.

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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The Government notes in its brief (at page 5, n.3) that trial counsel for Ostrer's co-defendant "knew of the Natco indictment . . .." That is true. However, it gives the misleading impression that one or more defense counsel therefore knew or should have known that in connection with the Natco bankruptcy fraud indictment, in which Hellerman was named as a

co-conspirator and indictee, Hellerman had received $80,000 of the bankrupt corporation's estate with the aid of the FBI and the United States Attorney's office. This $80,000 "gift" to Hellerman was never mentioned nor brought up in either the Natco case or at Ostrer's trial (in which Hellerman was the Government's sole incriminating witness against Ostrer). Ostrer's trial counsel could hardly be expected to guess, without any hints or clues, that a Government official would have engaged in this kind of activity. (Given the nature of the activity — the transmittal of $80,000 in stolen funds to a Government witness prior to his court testimony — it is readily apparent why there was no disclosure to defense counsel at trial!)

The Government states (at 9) that neither the District Court nor the Court of Appeals shared Petitioner's view of the record. This simply is not true. The District Court made quite specific findings of fact that were so shocking that the court declined to mention by name the Chief of the Criminal Division responsible for what happened; instead, the court referred to him simply as "the Chief." Apparently as an additional accommodation to this ex-Government official, the District Judge has thus far refrained from publishing his extensive opinion. Also, the dissent in the Court of Appeals shared the District Judge's view of the case, noting that the District Court's findings were well supported by the evidence and were entitled not to be disturbed on appeal. Petitioner urges this Court to call for the transcript of the evidentiary hearing if there is any doubt that the findings were not only supportable, but in fact virtually self-evident. The District Judge quite clearly arrived at his conclusions reluctantly, sadly, but with a firm eye on his duty. For the Government to claim (at 10) that "none of these opinions contains any suggestion of corrupt practices" is the height of inappropriate denial in the face of the overwhelming reality.

The Government seems to take comfort from the fact that "neither court found that Hellerman had committed perjury at petitioner's trial." Yet the crux of Petitioner's claim is precisely that he was unable to inquire of Hellerman as to his involvement with the Government in looting the bankrupt corporation, because these incidents were carefully and successfully hidden, until publication of Hellerman's autobiography (*Wall Street Swindler*) brought the matter into the open long after Ostrer's trial.

Contrary to the impression conveyed by the Government (at 10, n.6), Petitioner is not attempting to try the prosecutor's character, except insofar as his *Mesarosh*[1] argument is concerned. (There must come a point, after all, when enough is declared to be enough!) Petitioner's essential argument is that had the jury known of Hellerman's being assisted in criminal enterprises by the very prosecutor's office that was "sponsoring" him and vouching for his veracity, the jury almost certainly would not have believed Hellerman's uncorroborated testimony against Ostrer.

The Government (at 12) misunderstands the institutional problems posed by the way the disclosures in this case have been treated by the Department of Justice and by the Court of Appeals. The Government seems to feel that "there is no reason" to think that prosecutors will jeopardize convictions by witholding *Brady*[2] material. Of course, this is always the case with reversible error — there is seldom reason to believe that a prosecutor acting in good faith will intentionally suppress. However, what happened here was that the Chief of the Criminal Division acted *sub rosa* in funnelling stolen funds

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[1] *Mesarosh* v. *United States*, 352 U.S. 1 (1956).

[2] *Brady* v. *Maryland*, 373 U.S. 83 (1963).

for the use and benefit of a witness, because he apparently felt (as the District Court found) that getting this money to Hellerman was important in keeping his witness alive, satisfied, and "on the street." (See Petition at 43a). Once this was accomplished, one could expect the prosecutor not to disclose the $80,000 payment and his own role in it, to insure against the possibility that the caper would later be discovered and would be deemed reversible error by a reviewing court. In fact, given the Court of Appeals' application of the *Agurs*[3] doctrine to the facts of this case, prosecutors do not really have to even worry about reversible error when they act as the Chief acted here. Therefore, unless this Court takes an unequivocal stand on this kind of conduct, one can expect it to be repeated.

Finally, of course, it is an insult to the jury system to declare, as did the court below, that knowledge of the duet between the Chief and Hellerman in looting a bankrupt corporation for the benefit of the witness would not likely have changed the jury's view of Hellerman's veracity where his testimony was entirely uncorroborated, and where it was the Chief and the Government who vouched for his credibility.

Respectfully submitted,

ALAN DERSHOWITZ,
20 Elmwood Avenue,
Cambridge, Massachusetts 02138.
(617) 495-4617
Counsel for Petitioner.

Of Counsel
HARVEY A. SILVERGLATE,
ANN LAMBERT GREENBLATT,
SILVERGLATE, SHAPIRO
& GERTNER,
217 Lewis Wharf,
Boston, Massachusetts 02110.

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[3] *United States* v. *Agurs*, 427 U.S. 97 (1976).